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No. 06-694

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL COALITION AGAINST CENSORSHIP AND THE FIRST AMENDMENT PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. SECTION 2252A(a)(3)(B) WOULD CRIMINALIZE AND CHILL CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THIS COURT'S BINDING PRECEDENT 5

A. The Statute Criminalizes Speech About Fully Protected "Virtual" Sexually Explicit Materials 5

B. The Statute Threatens To Suppress A Wide Range Of Constitutionally Protected Speech 13

C. The Government's Untenable Statutory Interpretations Do Not Save The Statute From Unconstitutionality 16

D. The Statute Cannot Be Justified Under *Ginzburg* 21

II. SECTION 2252A(a)(3)(B) FAILS STRICT SCRUTINY 22

III. SECTION 2252A(a)(3)(B) IS VOID FOR VAGUENESS 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) ..... *passim*

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 8

Caminetti v. United States, 242 U.S. 470 (1917) 17

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 21

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 9

Ginzburg v. United States, 383 U.S. 463 (1966) 22

Grayned v. City of Rockford, 408 U.S. 104 (1972) 24, 25

Ibanez v. Florida Department of Business and Professional Regulation, 512 U.S. 136 (1994) 9

Kolender v. Lawson, 461 U.S. 352 (1983) 24

Lee v. Weisman, 505 U.S. 577 (1992) 7

Massachusetts v. Morash, 490 U.S. 107 (1989) 19

Miller v. California, 413 U.S. 15 (1973) 3, 7

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 9

New York v. Ferber, 458 U.S. 747 (1982) 3, 6, 7

Osborne v. Ohio, 495 U.S. 103 (1990) 6, 17

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 9

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 22

Reno v. ACLU, 521 U.S. 844 (1997) 14, 17, 24, 25

Splawn v. California, 431 U.S. 595 (1977) 22

Thompson v. Western States Medical Center, 535 U.S. 357 (2002) 9

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 22, 23

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 18, 19

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 24

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 22

Virginia v. Black, 538 U.S. 343 (2003) 7

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Whitney v. California, 274 U.S. 357 (1927) 2

Winters v. New York, 333 U.S. 507 (1948) 24

STATUTES

18 U.S.C. § 1466A 4

18 U.S.C. § 2252A(a)(1) 15

18 U.S.C. § 2252A(a)(2) 15

18 U.S.C. § 2252A(a)(3)(A) 15

18 U.S.C. § 2252A(a)(3)(B) ..... *passim*

18 U.S.C. § 2252A(a)(4) 15

18 U.S.C. § 2252A(a)(5) 12, 15

18 U.S.C. § 2252A(a)(5)(B) 4

18 U.S.C. § 2252A(b)(1) 12

18 U.S.C. § 2252A(b)(2) 12

18 U.S.C. § 2252A(c) 15

18 U.S.C. § 2256(8)(B) 6

18 U.S.C. § 2256(8)(D) 6, 8, 20

LEGISLATIVE MATERIALS

S. Rep. No. 108-2 (2003) 12

MISCELLANEOUS

Jeffrey Abt, *Forbidden Subjects: How Artists Innocently Run Afoul of the Law, Chronicle of Higher Education* (Mar. 21, 1997) http://chronicle.com/che-data/articles.dir/art-43.dir/issue-28.dir/28b00401.htm 3

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Webster's New Third International Dictionary (1993) 17, 20

INTEREST OF *AMICI CURIAE*[1]

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit organizations including literary, artistic, religious, educational, professional, labor, and civil liberties groups[2] that are united in their commitment to freedom of expression. Founded in 1974, the NCAC has educated thousands of artists, authors, teachers, students, librarians, readers, museum-goers, and others around the country about the dangers of censorship and how to oppose it. The NCAC produces legal and scholarly analyses of important free speech cases and controversies; it maintains a clearinghouse of information on a wide range of free expression issues; it assists individuals and community organizations dealing with censorship; and it promotes debate, discussion, and dialogue among diverse stakeholders in the free speech community.

The First Amendment Project ("FAP") is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Among NCAC's 52 members are the American Association of University Professors, American Civil Liberties Union, American Federation of Television & Radio Artists, American Society of Journalists & Authors, Association of American Publishers, The Dramatists Guild, Children's Literature Association, and the Screen Actors Guild. The views presented in this brief, however, are those of the NCAC and do not necessarily represent the views of any of its members.

Amici have a strong interest in any case in which speech alone is criminalized. As President Harry S. Truman said in vetoing the Internal Security Act of 1950, "'[t]here is no more fundamental axiom of American freedom than the familiar statement: [i]n a free country we punish men for crimes they commit but never for the opinions they have.'" Judge Leonard B. Sokolove, *The Price of Tighter Security is Lost Liberty*, INTELLIGENCER, Oct. 30, 2005, at 8D. Thus, as Justice Brandeis declared 70 years ago, the appropriate response to inflammatory, controversial, or offensive speech "is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

These principles have particular application in a case such as the present one, which involves the highly inflammatory issue of child pornography. In these circumstances, it is imperative that society's compelling interest in preventing the exploitation of children does not become an unwitting vehicle for creating a new class of thought crimes, targeting those whose sole "crime" is to engage in speech that is, or appears to be, about child pornography, but who neither commit crimes against children nor promote them.

Amici do not question the Government's authority to prosecute those who traffic in illegal child pornography. However, *amici* submit this brief to express our concern that Section 2252A(a)(3)(B) of the PROTECT Act goes too far in pursuing that laudable goal. The provision, if upheld, would constitute a dangerous expansion of the Government's ability to penalize and chill speech based on its content, and it would present widespread opportunity for abuse by local law enforcement officials. The risk, demonstrated time and again, is that police officers and prosecutors, in their zeal to combat real child abuse, will charge innocent people with child pornography, solely on the basis of their ideas,

fantasies, speech or expression. Because of the highly inflammatory nature of wrongful charges of child pornography, even the innocent will suffer severe repercussions regardless of whether they are ultimately exonerated.

The threat that child pornography laws could be misapplied to innocent victims is real. *Amici curiae* have tracked countless incidents in which innocent, harmless, or silly behavior has been targeted for criminal prosecution, including numerous cases in which parents, grandparents, and other family members have been investigated, prosecuted, and deprived of custody of their children for taking non-sexual pictures of their children partially or completely nude. *See* Marian Rubin, *et al.*, *Not A Pretty Picture: Four Photographers Tell Their Personal Stories About Child 'Pornography' and Censorship*, in *Censoring Culture: Contemporary Threats to Free Expression*, Robert Atkins & Svetlana Mintcheva, eds., 2006; and Jeffrey Abt, *Forbidden Subjects: How Artists Innocently Run Afoul of the Law*, *Chronicle of Higher Education* (Mar. 21, 1997) http://chronicle.com/che-data/articles.dir/art-43.dir/issue-28.dir/28b00401.htm. That these actions may be attributed to overzealous prosecutors and often dismissed or reversed on appeal provides small comfort to those caught in the process. It is precisely the overzealous prosecutors of the world who most need clear and definitive instructions from this Court.

SUMMARY OF ARGUMENT

The Constitution presents no obstacle to the criminalization of both obscene material, *see Miller v. California*, 413 U.S. 15, 23 (1973) ("[O]bscene material is unprotected by the First Amendment."), and images of actual minors engaging in sexually explicit conduct regardless of whether the images are obscene. *See New York v. Ferber*, 458 U.S. 747 (1982). This case does not involve the legitimate exercise of government authority in such cases.

Indeed, there is no suggestion that existing federal criminal laws, *see* 18 U.S.C. § 1466A (prohibiting obscene visual images of the sexual abuse of children); 18 U.S.C. § 2252A(a)(5)(B) (prohibiting the possession of an image of child pornography), were in any way insufficient in the case against Respondent, who was convicted under 18 U.S.C. § 2252A(a)(5)(B), is presently incarcerated, and will remain so regardless of the outcome of this appeal. Indeed, Respondent's sentence would not have been enhanced by his conviction under Section 2252A(a)(3)(B).

Rather, this case involves the facial unconstitutionality of Section 2252A(a)(3)(B),[3] which is designed to criminalize speech about materials involving virtual and simulated images of minors in sexual situations, and to circumvent this Court's decision in *Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Court rejected the Government's argument that it could ban non-obscene but sexually explicit materials involving virtual and simulated minors in order to affect the distribution of actual child pornography. The Court should now reject the Government's contention that it may ban speech *about* sexually explicit materials involving virtual and simulated minors in order to reach actual child pornographers.

Further, Section 2252A(a)(3)(B) threatens to criminalize a substantial range of speech that is neither commercial nor false – including sexually explicit materials involving simulations or virtual images of minors, sarcasm, hyperbole, jokes told in poor taste, mistaken beliefs, and advocacy

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[3] Section 2252A(a)(3)(B) of the PROTECT Act criminalizes knowingly "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" any "material or purported material in a manner that *reflects the belief*, or that is *intended to cause another to believe*, that the material or purported material is, or contains" either an "obscene visual depiction of a minor engaging in sexually explicit conduct" or a "visual depiction of an actual minor engaging in sexually explicit conduct." 18 U.S.C. § 2252A(a)(3)(B) (emphasis added).

speech – and is thus both substantially overbroad and void for vagueness. Because Section 2252A(a)(3)(B) reaches a substantial and impermissible array of constitutionally protected speech, and lacks necessary contextual and textual limitations on its application, it will permit arbitrary and ad hoc enforcement of severe criminal penalties against individuals engaging in fully protected speech.

Section 2252A(a)(3)(B) is not reasonably susceptible to the Government's proposed limiting constructions, and would be both unconstitutionally overbroad and vague even with the proposed limitations. The statute, on its face, and as properly construed, is a content-based restriction on speech that is unconstitutionally overbroad and vague, and violates strict scrutiny. This Court should thus affirm the decision below.

ARGUMENT

I. SECTION 2252A(a)(3)(B) WOULD CRIMINALIZE AND CHILL CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THIS COURT'S BINDING PRECEDENT.

A. The Statute Criminalizes Speech About Fully Protected "Virtual" Sexually Explicit Materials.

The evident purpose of Section 2252A(a)(3)(B) is to prevent the distribution of sexual content containing virtual and simulated images of minors, even though the Court has held that such material, when not obscene, is protected speech. The statute does this by criminalizing statements urging people to access virtual materials if those statements might be understood to imply that real children are involved. These provisions apply not only to virtual child pornography, but also to film versions of "Lolita" and other fictional and simulated depictions of sexual activity by minors. In effect, the law requires a distributor of legal materials to state expressly that the material is "fake" in order to avoid the risk

of criminal liability, and it imposes strict penalties on speech that is the product of mistake, confusion, or ambiguity. By subjecting a broad range of protected speech to severe criminal penalties, Section 2252A(a)(3)(B) runs directly afoul of the Court's decision in *Free Speech Coalition*.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court confirmed that, under the Court's prior decisions in *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990), only sexually explicit images created through the sexual exploitation of real children are wholly exempt from First Amendment protection. *See Free Speech Coalition*, 535 U.S. at 251-56. The Court thus struck down Sections 2256(8)(B) and 2256(8)(D) of the Child Pornography Prevention Act of 1996 ("CPPA") as facially overbroad and therefore unconstitutional under the First Amendment. *See Free Speech Coalition*, 535 U.S. 234.[4]

In striking down these sections of the CPPA, the Court refused to hold that all depictions of minors engaged in sexual activity are "by definition without value." *Id.* at 251. Rather, this Court found that the exception for child pornography was "based upon how it was made, not on what it communicated." *Id.* at 251. In other words, although the Court recognized in *Ferber* that laws "directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy," *Ferber*, 458 U.S. at 756, it

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[4] Section 2256(8)(B) of CPPA prohibited "any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture that is, [or appears to be], of a minor engaging in sexually explicit conduct," while Section 2256(8)(D) defined child pornography "to include any sexually explicit image that was advertised, promoted, presented, described, or distributed in such a manner that conveys the impression it depicts a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 241-432 (internal quotation marks omitted).

found that the state's interest in preventing the sexual exploitation of children is paramount when actual children are involved in the production of pornography. *See Free Speech Coalition*, 535 U.S. at 249.

This calculus changes, however, in the case of sexually explicit materials involving simulations and virtual images of minors because no actual children are involved in the production of the material. As this Court found in *Free Speech Coalition*, "where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Id.* at 251; *see also id.* at 250 (stating that virtual child pornography "records no crime and creates no victims by its production"). Indeed, in *Ferber*, this Court suggested that sexual content using simulations to create the *illusion* of minors engaged in sexual activity was a viable constitutional alternative to the use of actual minors. *See Ferber*, 458 U.S. at 763. Although it is true that many would find sexually explicit material utilizing virtual and/or simulated images of minors to be offensive, First Amendment law is clear that "speech may not be prohibited because it concerns subjects offending our sensibilities." *Free Speech Coalition*, 535 U.S. at 245; *see Virginia v. Black*, 538 U.S. 343, 358 (2003)("The hallmark of the protection of free speech is to allow 'free trade in ideas' – even ideas that the overwhelming majority of people might find distasteful or discomforting.")(citation omitted); *Lee v. Weisman*, 505 U.S. 577, 590 (1992) ("To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry.") Further, as the Court has emphasized in the parallel context of obscenity, "statutes designed to regulate obscene materials must be carefully limited" because there are "inherent dangers of undertaking to regulate any form of expression." *Miller*, 413 U.S. at 23-24.

Where, as here, a law punishes a "substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep," the law will be invalidated on overbreadth grounds. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Section 2252A(a)(3)(B) subjects to prosecution anyone who "advertises, promotes, presents, distributes, or solicits . . . any *material or purported material* in a manner that *reflects the belief*, or that is *intended to cause another to believe*, that the material or purported material *is, or contains* – (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct." (emphasis added). The Government concedes that simulations and virtual images of minors are covered under the terms of Section 2252A(a)(3)(B). Petr's Br. at 48 ("The statute properly reaches concerted efforts to promote materials as real child pornography even if the image or video actually delivered is innocuous[.]").[5] The statute thus suppresses speech that the Court held is protected under the First Amendment in *Free Speech Coalition*. *See* 535 U.S. at 250-51.

By their nature, materials that use adult actors or computer-generated images to portray minors engaged in sexually explicit conduct are intended to simulate actual minors engaging in such conduct. In such a case, the statement describing simulated or virtual materials would not be "false," as the Government suggests – rather, such statements could not strictly be described as "true" or "false,"

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[5] Indeed, the language of Section 2252A(a)(3)(B) mirrors CPPA's constitutionally infirm Section 2256(8)(D), which defined child pornography "to include any sexually explicit image that was advertised, promoted, presented, described, or distributed in such a manner that conveys the impression it depicts a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 242 (internal quotes omitted).

yet they would be subject to severe criminal penalties under Section 2252A(a)(3)(B). Thus, a wide range of statements describing simulated and virtual materials – such as urging another to view "hot pictures of kids having sex" or to "watch these steamy scenes of an old man having sex with a 12-year-old Lolita" – would appear to fall squarely within the terms of the statute.

The Government therefore is wrong when it argues that the statute prosecutes only truthful "pandering" of actual child pornography and false speech that is devoid of constitutional protection.[6] Rather, in its failure to require that the defendant know or intend the underlying material to be actual child pornography, Section 2252A(a)(3)(B) punishes speech without context. The government, however, "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Free Speech Coalition*, 535 U.S. at 253 (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)). As the Court of Appeals properly found, "[h]owever repugnant we may find them, we may not constitutionally suppress a defendant's beliefs that simulated

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[6] The Government's sweeping statement that all non-commercial "false" speech is devoid of First Amendment protection is also incorrect. To the contrary, the Court has emphasized that the First Amendment "requires that [the Court] protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Indeed, the Court has repeatedly found it preferable to encourage the robust and open exchange of ideas at the expense of allowing some false speech to be disseminated, rather than prohibit all false speech at the expense of chilling protected speech. *See, e.g.*, *Gertz*, 418 U.S. at 340-41; *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). Likewise, the Government's suggestion that criminalizing false or misleading commercial speech gives rise to *no* First Amendment protections ignores the Court's decisions affording protection to commercial speech, even in the context of claims that the speech is false or misleading. *E.g.*, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002); *Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 146 (1994).

depictions of children are real or that innocent depictions of children are salacious." Pet. App. 26a-27a. Section 2252A(a)(3)(B) therefore "goes well beyond [prohibiting illegal conduct] by restricting the speech available to law-abiding adults." *Free Speech Coalition*, 535 U.S. at 252-53. The Government may regulate and punish trafficking in actual child pornography, but it may not restrict otherwise fully protected speech simply because it bears a resemblance to unprotected speech. That is precisely what the Court held only a few years ago in *Free Speech Coalition*.

The Government nonetheless asks this Court to ignore its holding in *Free Speech Coalition* and uphold a criminal law that would ban speech promoting virtual or simulated depictions of minors engaged in sexual activity, but offers no new rationales or arguments to justify disturbing the precedent. Instead, the Government presses the same arguments already raised and rejected in *Free Speech Coalition*. Thus, while conceding that the statute could be used to prosecute an individual whose statements – and the material underlying the statements – are otherwise entirely protected, *see* Pet'r Br. at 35, the Government repeats the claim that criminalization of such speech is constitutionally permissible because "[m]istaken speech of this character. . . . creates the impression that a supply of or demand for real child pornography exists, and thus leads to the abuse of children." Pet'r Br. at 36. Similarly, according to the Government, "Congress may regulate the demand side of this illegal market by prohibiting child-pornography solicitations, even if the material ultimately supplied is not actual child pornography, in an effort to 'stamp out this vice at all levels in the distribution chain.'" Pet'r Br. at 30-31 (quoting *Osborne*, 495 U.S. at 110). But as the Court of Appeals noted, that argument was squarely rejected by this Court in *Free Speech Coalition*. Pet. App. 13a.

In *Free Speech Coalition*, as here, the Government argued that banning virtual images of children engaged in sexually explicit conduct was necessary in order to "eliminat[e] the market for pornography produced using real children." 535 U.S. at 254. The Court rejected that proposition, holding that the Government's "market deterrence" theory did not justify a complete suppression on speech where "there is no underlying crime at all," because "virtual" images depicting minors engaged in sexual activity do not involve the sexual exploitation of children. *See id.* The Government must show "more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse." *Id.* at 253. Here, Section 2252A(a)(3)(B) contains no requirement that the underlying material is actual child pornography, that the defendant intends the underlying material to be actual child pornography, or that there is *any* underlying material at all. Where there is no underlying crime, the Government's market deterrence theory is insupportable. *See id.* at 254.

The Government also argues, as it did in *Free Speech Coalition*, that Section 2252A(a)(3)(B) is justified as a means to aid law enforcement, because of the difficulties of discerning which images involve real minors and which are simulated or virtual. Pet'r Br. at 48-49. But in striking down an almost identical provision in the CPPA, the Court rejected precisely the same argument, holding that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Free Speech Coalition*, 535 U.S. at 255. The constitutional boundary drawn by the Court in *Free Speech Coalition* is clear: virtual and simulated depictions of sexually explicit activity involving minors are constitutionally protected, while child pornography produced through the exploitation of actual children is not. Congress "may pass valid laws to protect children from abuse, and it

has; [t]he prospect of crime, however, by itself does not justify laws suppressing protected speech." *Id.* at 245.

Boiled down to its essence, it is clear that the Government's position, rejected in *Free Speech Coalition*, has not changed. The Government seeks to cast a wide net over protected speech in order to minimize the burdens on prosecutors because such protected speech resembles unprotected speech.[7] The fact that actual child pornography is illegal does not relieve the government of its duty to establish required elements for the substantive offenses of distribution and possession of real child pornography; and it certainly cannot be used to impose severe criminal penalties on those who are engaging in entirely protected speech. *See id.* at 255 (noting that the government raises "serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful").[8] The Government offers no new logic to support

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[7] Indeed, the Government's real goal appears to be avoiding the need to prove the existence of *any* underlying materials altogether. *See* Pet'r Br. at 49. The history of the provision – and the Government's defense of it – makes clear that the purpose of Section 2252A(a)(3)(B)'s broad language is to sweep in protected simulated and virtual sexually explicit depictions of minors to relieve prosecutors of their constitutional burden of proving that defendants accused of possessing, distributing, and/or soliciting child pornography have trafficked in child pornography that was produced through the sexual exploitation of actual children. *See* S. Rep. No. 108-2, at 6 (2003) (stating that the PROTECT Act seeks to allow prosecutors to "establish [their] case-in-chief when the children portrayed in sexually explicit depictions appear virtually indistinguishable from actual minors").

[8] Indeed, Section 2252A(a)(3)(B) potentially punishes protected speech more severely than actual possession of real child pornography. Section 2252A(a)(3)(B) punishes those convicted with a mandatory jail sentence of between five and ten years for a first conviction, *see* 18 U.S.C. § 2252A (b)(1), while those convicted of possessing child pornography under Section 2252A(a)(5) of the PROTECT Act may only receive a fine. *See* 18 U.S.C. § 2252A(b)(2).

its argument that the Court should abandon the holdings of *Ferber* and *Free Speech Coalition*.

B. The Statute Threatens To Suppress A Wide Range Of Constitutionally Protected Speech.

Because Section 2252A(a)(3)(B) threatens to criminalize a substantial amount of speech that is neither commercial nor false, it is unconstitutionally overbroad. The breadth – that is, overbreadth – of its sweep is substantial. For example, a person could be prosecuted under the terms of Section 2252A(a)(3)(B) if he or she sent an e-mail with an attached video containing a preview of the 1992 movie "The Lover," with text that read, "A 15-year-old French girl is sent to a Saigon boarding school, where she meets a 32-year-old Chinese aristocrat. Love at first sight leads to a liaison where the lovers revel in a variety of sexual encounters," regardless of the fact that the attached material is artistic expression that is wholly protected under the First Amendment and the text presented in the e-mail is an almost verbatim transcription of the movie's description on Netflix.com.[9]

Section 2252A(a)(3)(B)'s overbreadth is exacerbated by its extremely vague terms. The statute's critical phrase – "in a manner that reflects the belief or that is intended to cause another to believe" – is completely unclear, especially in contexts where speech prohibited under this section may be similar, or even identical, to speech that the Court has declared is protected. A reasonable person could be wary

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[9] The full Netflix synopsis of "The Lover" is "Set in French Colonial Vietnam in 1929, this Oscar-nominated film explores the erotic charge of forbidden love. A 15-year-old French girl is sent to a Saigon boarding school, where she meets a 32-year-old Chinese aristocrat. Love at first sight leads to a liaison where the lovers revel in a variety of sexual encounters. They both realize that their love is doomed, however, as neither of their families will approve of the interracial coupling." *See* http://www.netflix.com/Movie/The_Lover/60011230?trkid=189530&strkid=742730821_0_0 (last visited Aug. 14, 2007).

that an e-mail containing attachments concerning a film graphically depicting childhood sexual abuse – including mainstream films such as "Bastard Out of Carolina"[10] or "Hounddog"[11] – could subject him to criminal penalties if the e-mail were accompanied by text stating, "This material is absolutely repugnant. Why would anyone want to watch a graphic scene of a man raping a child?" Such an e-mail is susceptible to being interpreted as "presenting" material that the distributing person "intend[s] to cause another to believe" is "a visual depiction of an actual minor engaging in sexually explicit conduct." The lack of clarity in the terms used by Section 2252A(a)(3)(B) "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images," *Reno v. ACLU*, 521 U.S. 844, 872 (1997), thus impermissibly chilling a substantial amount of speech.[12]

Section 2252A(a)(3)(B)'s broad and vague terms also sweep in non-commercial, truthful speech such as sarcasm, hyperbole, jokes told in poor taste, mistaken beliefs, and

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[10] "Bastard Out of Carolina," a 1996 movie directed by Anjelica Huston, is based on Dorothy Allison's 1992 novel about childhood physical and sexual abuse. *See* http://www.netflix.com/Movie/Bastard_out_of_Carolina/287069?trkid=189530&strkid=663234440_0_0 (last visited Aug. 14, 2007); http://www.imdb.com/title/tt0115633/ (last visited Aug. 14, 2007). The movie was initially banned by Canada's Maritime Film Classification Board, though that ban was reversed on appeal. *See* Parker Barss Donham, *Let's Get Over Our Nervousness*, Halifax Daily News, March 2, 1997, available at http://www.cfc.ca/pages/media/halifax-daily-news.02mar97.html.

[11] "Hounddog" is a 2007 movie about a "precocious but abused 12-year-old who finds comfort in Elvis Presley's music." *See* http://www.netflix.com/Movie/Hounddog/70061472?trkid=189530&strkid=482614468_0_0 (last visited Aug. 14, 2007). The movie's depiction of the rape of the lead character, played by 12-year old Dakota Fanning, was marked by controvery. *See, e.g.*, http://www.foxnews.com/story/0,2933,246698, 00.html (last visited Aug. 14, 2007).

[12] For these same reasons, Section 2252A(a)(3)(B) is also unconstitutionally vague. *See infra* Section II.

advocacy speech. For example, the plain language of Section 2252A(a)(3)(B) would appear to permit the prosecution of an individual who e-mailed a video clip of a simulated sex scene from a film version of "Lolita" with text that was sarcastic ("Wow. This scene with the old man having sex with the 12-year-old was hot. Yeah, not really. Ew. Can you believe this?"); text that revealed a mistaken belief ("I just found this video file on this library computer and I believe it's kiddie porn. Can we see about blocking people from viewing this kind of material on the library's computers?"); as well as text advocating stricter laws against child pornography ("You see, this kind of obscene material involving children having sex is abhorrent. We need stricter laws."). It does not take much imagination to think of a panoply of other examples involving lewd jokes, overstatements, and honestly mistaken beliefs that could also trigger prosecution under Section 2252A(a)(3)(B).

The statute's constitutional infirmities are exacerbated by its failure to tie the speech communicated to proof, knowledge, or intent that the underlying materials contain images of actual child pornography. Because the operation of Section 2252A(a)(3)(B) is wholly divorced from the underlying material presented, or even from the requirement that there *be* underlying material, the determination of illegality "turns on how the speech is presented, not on what is depicted." *Free Speech Coalition*, 535 U.S. at 257.[13]

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[13] Indeed, an individual charged with violating 2252A(a)(3)(B) may not even defend himself on the ground that the material does not involve actual minors. Although federal law provides an affirmative defense to someone charged with transporting, receiving, distributing, reproducing, selling, or possessing child pornography under 18 U.S.C. §§ 2252A(a)(1), (a)(2), (a)(3)(A), (a)(4), or (a)(5), it does not provide such a defense for a person's description of materials depicting minors engaged in sexually explicit activity – even if the materials are fully protected. *See* 18 U.S.C. § 2252A(c).

Even if the material advertised, promoted, presented, distributed or solicited contains no sexually explicit scenes involving minors, the sender could be treated as a "panderer" of child pornography merely if his or her statements about the material "convey[ed] the impression that [such] scenes would be found in the [material]." *Free Speech Coalition*, 535 U.S. at 257. The law, as written, lacks sufficient textual limits, and thus criminalizes a broad range of speech that would otherwise be protected.

C. The Government's Untenable Statutory Interpretations Do Not Save The Statute From Unconstitutionality.

The Government argues repeatedly that the statute, "properly understood," or "properly construed," could not conceivably be applied to suppress protected speech. *See* Pet'r Br. at 14, 17, 32, 44. Implicit in the Government's contorted attempts to read limitations into the statutory text is an acknowledgment that under its plain language, Section 2252A(a)(3)(B) *would* chill and penalize a significant amount of constitutionally protected speech.

The Government thus asserts that the phrase "in a manner that reflects the belief, or that is intended to cause another to believe," implies objective and subjective elements that are not specified in the statute. Under the Government's interpretation, a person may be held liable for violating Section 2252A(a)(3)(B) only where the Government can prove that the speaker believed, or intended to cause another to believe, that the materials depicted child pornography involving actual children, and that the individual knew "that a reasonable person would interpret his words, in context, as referring to real child pornography." Pet'r Br. at 34. Further, the Government claims that 2252A(a)(3)(B) "encompass[es] only direct offers to send, or attempts to obtain, real or purported contraband," Pet'r Br. at 27, and could not reach

general "promotions" of "virtual" or "simulated" sexually explicit materials depicting minors.

The problem with the Government's proposed limiting interpretations – which serve to underscore the serious overbreadth and vagueness problems raised by the statute's plain language – is that they can be achieved only by ignoring the common usage of the plain language of Section 2252A(a)(3)(B). Although this Court may "impose a limiting construction on a statute" in considering a facial challenge, it may only do so if the statute is "'readily susceptible' to such a construction." *ACLU*, 521 U.S. at 884 (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). If the statute is not readily susceptible to such a construction, then the Court will not rewrite the law "to conform it to constitutional requirements." *ACLU*, 521 U.S. at 884-85 (quoting *Am. Booksellers*, 484 U.S. at 397); *see also Osborne*, 495 U.S. at 121 (stating that judicial rewriting of statutes would derogate Congress' "incentive to draft a narrowly tailored law in the first place"). Here, the Government's attempts to limit the broad and vague language of the statute fail as a matter of statutory interpretation and, in any event, do not save the law from unconstitutionality.

The Government's claim that the term "in a manner" creates an "objective benchmark" of a reasonable person standard, Pet'r Br. at 33, is not supported by anything in the statute's text. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed[.]" *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The plain meaning of "manner" is "[a] way of doing something or the way in which a thing is done or happens." *American Heritage Dictionary of the English Language* 1065 (4th ed. 2000); *see also Webster's Third New Int'l Dictionary* 1376 (1993) (defining "manner" as "the mode or method in which something is done or happens[;] a mode of procedure or way of acting"). Section

2252A(a)(3)(B) thus means exactly what it says – that speech is criminalized when it is "advertise[d], promote[d], present[ed], distribute[d], or solicit[ed]" in such a way that the communication "reflects the belief," or "is intended to cause another to believe" that the "material or purported material" is obscene or a "visual depiction of an actual minor engaging in sexually explicit conduct." Had Congress intended to include a "reasonable person" standard in the statute, it easily could have done so.

Nor is there any support in the statute for the knowledge element posited by the Government – *i.e.*, that the statement be made with *knowledge* that a reasonable person would interpret the speaker's words as intending, or causing the recipient to believe, that the material contained images of actual children. Pet'r Br. at 34. As the Government concedes, such an element could be implied only through a tortured grammatical reading of Section 2252A(a)(3)(B). Pet'r Br. at 34.[14] Moreover, the factors that led the Court to read a "knowingly" scienter requirement into a different child pornography statute in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), are entirely missing here. In *X-Citement Video*, the Court found that although the "most natural grammatical reading . . . suggests that the term 'knowingly' modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduces," *id.* at 68, that result would lead to a number of anomalies, *see id.* at 68-69,

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[14] The Government urges the Court to apply the word "knowingly" not only to the surrounding verbs of "advertis[ing], promot[ing], present[ing], disribut[ing], or solicit[ing]," but also to the requirement that the communication be made "in a manner that reflects the belief, or that is intended to cause another to believe." The awkwardness of this construction is evident when one inserts the word "knowingly" where the Government suggests it should be – "knowingly . . . advertises, promotes, presents, distributes, or solicits . . . material or purported material [knowingly] in a manner that reflects the belief, or that is [knowingly] intended to cause another to believe."

including absurd construction of the statute, *see id.* at 69, inconsistency with the legislative history, *see id.* at 73-78, and a lack of scienter requirement in the statute, *see id.* at 78. Here, by contrast, the purpose of the term "knowingly" in the statute is clear: to respond to the Court's concern in *Free Speech Coalition* that the CPPA criminalized "possession of material described, or pandered, as child pornography by someone earlier in the distribution chain." 535 U.S. at 258. By requiring that defendants "knowingly" advertise, promote, present, distribute, or solicit material, Congress addressed the Court's concern that "the taint remains on the speech in the hands of subsequent possessors." *Id.* at 243. Reading "knowingly" to apply only to the surrounding verbs thus does not lead to absurd statutory results in this case; rather, it is fully consistent with the statute's legislative purpose.

Likewise, the Government cannot successfully limit the broad reach of Section 2252A(a)(3)(B) by limiting the words "advertises," "promotes," "presents," "distributes," or "solicits" solely to "direct offers to send, or attempts to obtain, real or purported contraband." Pet'r Br. at 27. That is plainly not the language used by the statute, nor is the statute readily susceptible to such a construction. Contrary to the Government's claims, the statute is not limited to commercial exchanges, and the Government's invocation of the interpretive canon of *noscitur a sociis* to limit Section 2252A(a)(3)(B) is not persuasive.

The doctrine of *noscitur a sociis* states that "words grouped in a list should be given related meaning." *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989). In Section 2252A(a)(3)(B), the words "advertises," promotes," "presents," "distributes," and "solicits" are grouped together. All of these words have non-commercial definitions: advertise can mean "[t]o make known;" promote can mean "[t]o urge the adoption of; advocate;" distribute can mean

"[t]o deliver or pass out:" and solicit can mean "[t]o seek to obtain by persuasion, entreaty, or formal application." *American Heritage Dictionary of the English Language* 25, 525, 1403, 1654 (4th ed. 2000); *see also Webster's Third New Int'l Dictionary* 31, 660, 1815, 2169 (1993) (defining "advertise" as "to make known to (someone) : give notice to : inform : notify;" "promote" as "to contribute to the growth, enlargement, or prosperity of : further, encourage;" "distribute" as "to divide among several or many: deal out: apportion esp. to members of a group;" and "solicit" as "to make petition to : entreat, importune" "or to strongly urge (as one's cause or point) : insist upon" or "to endeavor to obtain by asking or pleading : plead for."). In contrast, only four of these words have comparable commercial definitions – "presents" lacks a commercially relevant definition. *See The American Heritage Dictionary of the English Language* (4th ed. 2000); *see also Webster's Third New Int'l Dictionary* (1993). Section 2252A(a)(3)(B) is thus not "readily susceptible" to the construction that only speech regarding commercial exchanges is regulated. Indeed, in considering almost identical language in Section 2256(8)(D) of the CPPA, the Court found that language banning depictions of sexually explicit conduct that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," did not "require that the context be part of an effort at 'commercial exploitation.'" *Free Speech Coalition*, 535 U.S. at 258.

In sum, under the statute's plain text, it impermissibly prohibits speech based "on how the speech is presented, not on what is depicted." *Free Speech Coalition*, 535 U.S. at 257. Even if the Government's narrowing interpretations were accepted by the Court, it still would not cure Section 2252A(a)(B)(3)'s constitutional infirmities because, as the Government acknowledges, speech promoting non-obscene

sexually explicit materials involving simulated or virtual images of minors would still be proscribed. Petr's Br. at 35-36. The Government's proposed narrowed interpretation – that the statement be made with knowledge that a reasonable person would interpret the speaker's words as intending, or causing the recipient to believe, that the material was obscene or contained a visual depiction of an actual minor engaged in sexually explicit activity – would still capture speech that is "true" and fully protected. *See supra* pp. 5-12. The Court held in *Free Speech Coalition* that the Government cannot ban sexual content involving virtual images of minors in the effort to penalize actual child pornography, and it should now reject the Government's argument that it may ban speech *about* sexually explicit materials involving virtual minors in order to penalize actual child pornographers.

D. The Statute Cannot Be Justified Under *Ginzburg*.

The Court should reject the suggestion, implicit in the Government's brief, and made explicitly by *amicus curiae* Morality in Media, that Section 2252A(a)(3)(B) may be sustained as a form of proscribable pandering *per se*, that is, pandering without any evidence as to the underlying material presented. *See* Petr's Br. at 37-38, 41 n.15 (stating that a person should be prosecuted under Section 2252A(a)(3)(B) for suggesting that Disney's "Snow White" contains a visual depiction of actual child pornography even if the underlying videotape is blank); Morality in Media, Brief Amicus Curiae of Morality in Media, Inc. at 7 (Jun. 11, 2007) (No. 06-694). The Court has never held that the Government may criminalize pandering *per se*. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 238 n.1 (1990) (Brennan, J. concurring) ("What *Ginzburg* did not do, and what this Court has never done, . . . is to abrogate First Amendment protection for an entire category of speech-related businesses."). Rather, the Court has held only that "in close cases evidence of pandering may be probative with respect to

the nature of the material in question," and thus help provide context for application of the obscenity test. *Ginzburg v. United States*, 383 U.S. 463, 474 (1966); *see also Free Speech Coalition*, 535 U.S. at 237-38; *Splawn v. California*, 431 U.S. 595, 598 (1977). *Ginzburg* does not support the argument that pandering is a crime independent of the materials being pandered, nor that material protected under the First Amendment loses its constitutional protection because of the way it is described or advertised.[15]

II. SECTION 2252A(a)(3)(B) FAILS STRICT SCRUTINY.

Because Section 2252A(a)(3)(B) is a content-based regulation, it is "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and must satisfy strict scrutiny, which requires the statute "be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* It is "rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 818.

Although the Government has a compelling interest in combating actual child pornography, it does not have a compelling, or even legitimate, interest, in "suppress[ing] lawful speech as the means to suppress unlawful speech."

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[15] Indeed, as the Court of Appeals noted, it is unclear that the pandering rationale used in *Ginzburg* survived this Court's subsequent decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which this Court held that commercial speech was entitled to First Amendment protection. As Justice Stevens observed in *Playboy Entm't Group, Inc.*, 529 U.S. at 829 (Stevens, J. concurring), it is "anachronistic" after *Virginia State Board* to contend that otherwise legal material should be deemed obscene merely because of its titillating marketing. *See also Splawn v. California*, 431 U.S. 595, 603 n.2 (1977) (Stevens, J. dissenting).

Free Speech Coalition, 535 U.S. at 255; *see also* Br. of Media Coalition at 12-13. Section 2252A(a)(3)(B) also fails strict scrutiny because it is not narrowly tailored to promote the Government's interest in combating actual child pornography. As explained above, the breadth of the statute's vague terms, along with its failure to correlate the speech with underlying criminal material, impermissibly sweeps in a wide range of protected, non-commercial, and "true" speech within its ambit. *See supra*, Parts I.A and I.B. As a result, Section 2252A(a)(3)(B) is far from narrowly tailored.

If, as the Government argues, Section 2252A(a)(3)(B) were intended to proscribe only "offers and solicitations of illegal products" and "misleading offers of material purported to be contraband," then Congress could reach such conduct with a far less restrictive statute – one that married the prohibited speech with the underlying materials. For example, if Section 2252A(a)(3)(B) were narrowed to prohibit "knowingly . . . advertis[ing], promot[ing], distribut[ing], or solicit[ing] . . . any material . . . [that the person knows to be or to contain] . . . an obscene visual depiction of a minor engaging in sexually explicit conduct; or . . . a visual depiction of an actual minor engaging in sexually explicit conduct," then the statute would still reach "offers and solicitations of illegal products" – actual child pornography – without impermissibly criminalizing a broad swath of protected speech. Given the existence of plausible, less restrictive alternatives, "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't*, 529 U.S. at 816.

III. SECTION 2252A(a)(3)(B) IS VOID FOR VAGUENESS.

Section 2252A(a)(3)(B) is not only unconstitutionally overbroad, it is also unquestionably void for vagueness.[16] A penal statute is void for vagueness where it does not define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws "offend several important values." *Grayned*, 408 U.S. at 108. First, they "may trap the innocent by not providing fair warning." *Id.* Second, vague laws "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis[.]" *Id.* at 108-09; *see also Kolender*, 461 U.S. at 358 n.7 (stating that it would be "dangerous if the legislature could set a net large enough to catch all possible offenders" and then leave it to the courts "to step inside and say who could be rightfully detained, and who should be set

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[16] Overbreadth and vagueness are "logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). In the First Amendment context, both doctrines guard against laws that impermissibly chill a substantial amount of protected speech. *See ACLU*, 521 U.S. at 871-72; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.6 (1982). Despite the Government's contention that this Court should not consider Williams' vagueness challenge because his conduct under Section 2252A(a)(3)(B) involved child pornography involving actual minors, facial vagueness challenges are permitted if the law in question reaches "a substantial amount of constitutionally protected speech." *Kolender*, 461 U.S. at 358 n. 8 (quotation marks omitted); *see also Hoffman Estates*, 455 U.S. at 494. This is especially true in cases involving criminal sanctions, which "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *ACLU*, 521 U.S. at 872; *see also Winters v. New York*, 333 U.S. 507, 515 (1948); *Kolender*, 461 U.S. at 358 n.8.

at large"). Precision in drafting is particularly important under the First Amendment because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

The language used in Section 2252A(a)(3)(B) fails both to define the crime of "pandering" child pornography with sufficient definiteness to give an ordinary person notice of what conduct is proscribed and to give law enforcement sufficient standards to prevent arbitrary and ad hoc enforcement. As discussed in Part I.B., *supra*, it is far from clear that the terms "advertises, promotes, presents, distributes," and "solicits" are limited solely to commercial exchanges, or whether they also encompass non-commercial speech such as advocacy, sarcasm, and lewd jokes. Additionally, as the Court of Appeals found, the phrase "in a manner that reflects the belief, or that is intended to cause another to believe" is "so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed." Pet. App. 39a. The lack of clarity in the terms used by Section 2252A(a)(3)(B) "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *ACLU*, 521 U.S. at 872.

Moreover, the statute lacks sufficient textual and contextual limits to prevent arbitrary or ad hoc law enforcement actions. As a result, "[i]ndividual officers are thus endowed with incredibly broad discretion to define whether a given utterance or writing contravenes the law's mandates." Pet. App. 39a. As currently written, a person who uploads a video to the Internet with the description, "Hot, Heavy, and Graphic Teen Sex" could be prosecuted under Section 2252A(a)(3)(B) regardless of whether (a) the video is a visual depiction of actual 14-year olds engaged in

sexually explicit conduct, (b) the video is a visual depiction of youthful-looking 21-year-olds engaged in sexually explicit conduct, (c) the video is a scene from the movie "Lolita," (d) the video is a homemade video castigating those interested in looking at child pornography, or (e) the video link even functions. Because the statute, as written, criminalizes the statement "Hot, Heavy, and Graphic Teen Sex" without regard to the underlying material, police could interpret any of the examples as criminal behavior, even if they involve wholly protected First Amendment speech. As a result, Section 2252A(a)(3)(B) should be invalidated as impermissibly vague.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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